DOCUMENT RESUME

ED 343 168 CS 507 739

AUTHOR Bollier, David
TITLE Electronic Media Regulation and the First Amendment: A Perspective for the Future. Report of a Conference of the Aspen Institute's Program on Communications and Society (Queenstown, Maryland, June 3-5, 1990). Forum Report #14.
INSTITUTION Aspen Inst., Queenstown, MD.
SPONS AGENCY John and Mary R. Markle Foundation, New York, N.Y.
REPORT NO ISBN-0-89843-103-4
PUB DATE 91
NOTE 29p.
AVAILABLE FROM The Aspen Institute, Program on Communications and Society, 1250 Connecticut Ave., N.W., Washington, DC 20036.
PUB TYPE Collected Works - Conference Proceedings (021) -- Viewpoints (Opinion/Position Papers, Essays, etc.) (120)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Federal Regulation; Freedom of Speech; *Futures (of Society); Government Role; Information Sources; *Mass Media; Public Policy
IDENTIFIERS *Electronic Media; *First Amendment; Media Government Relationship

ABSTRACT

Suggesting future lines of inquiry for policymakers and others, this report attempts to distill the essential points of discussion and debate that occurred during a conference on electronic media regulation and the first amendment attended by 21 experts representing legislative, regulatory, business, judicial, academic, audience, and media interests. Sections of the report discuss: coping with the "paradigm" shift in communications; the old paradigms and how they work; broadcasting and scarcity: the Geller critique; reactions to Geller and alternative paradigms; the hybrid first amendment rights of cable television; is common carriage incompatible with the first amendment?; proposed theories of the first amendment in the era of electronic media; reactions to the 10 theories of the first amendment; and the question whether a single theory of the first amendment can embrace both print and electronic media? A partial list of referenced cases, a list of conference participants, and the Program on Communications and Society policy statement are attached. (RS)

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The Aspen Institute

Communications and Society

Electronic Media Regulation and the First Amendment

A Perspective for the Future

DAVID BOLLIER
Rapporteur

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FORUM REPORT

Electronic Media Regulation and the First Amendment:

A Perspective for the Future

by

David Bollier

This is ***FORUM REPORT*** *#14* in a series intended
to invite wider interest in the concerns and activities of
The Aspen Institute Project on Enhancing the Social Benefits of New Electronic Technologies

supported by a grant from

The John and Mary R. Markle Foundation

Report of a Conference of
The Aspen Institute's
Program on Communications and Society
Wye Woods Conference Center
Queenstown, Maryland

CS507739

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The Aspen Institute
Wye Center, P.O. Box 222
Queenstown, Maryland 21658
Published in the United States of America
in 1991 by The Aspen Institute

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Printed in the United States of America

ISBN #0-89843-103-4

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THE REPORT

The 1980s saw a remarkable profusion of new electronic technologies that are now routinely used in mass communications, business, and households. Such media as personal computers, video cassette recorders, interactive video disks, cable television, satellites and home dishes, and fiber optics, among others, have dramatically altered the economic and social landscape.

While often admired for their remarkable technical capabilities, these media are also creating serious uncertainties, even havoc, with the received corpus of First Amendment law. New electronic media are often profoundly different in character from either print or broadcasting, upon which First Amendment communications law has traditionally been based. For example, units of information can now be digitalized and therefore manipulated, replicated and transmitted far more easily and inexpensively. New forms of interactive video communication defy conventional notions of "publishing."

In this radical new milieu, in which telephone companies claim a constitutional right to "publish" over their own lines and cable companies liken themselves to newspapers, it becomes exceedingly urgent to ask how traditional First Amendment legal standards should be modified, if at all. Should each medium be considered a "law unto itself," as the Supreme Court declared long ago? Or should Congress, the courts and the FCC try to develop a more coherent, integrated legal framework? Should freedom of expression apply primarily to the owners of the means of dissemination, or to any citizen who wants to disseminate information through that medium? After all is said and done, what means should Congress or the FCC employ to achieve its desired goals for the use of these media?

To address these and related questions, The Aspen Institute's Program on Communications and Society convened 21 experts, most of them attorneys, who represent legislative, regulatory, business, judicial, academic, audience and media interests. (A complete list of participants is included in Appendix A.) Charles M. Firestone, Director of the Program on Communications and Society, moderated the conference, which consisted of seven ninety-minute sessions.

This report attempts to distill the essential points of discussion and debate, and in the process suggest fruitful lines of inquiry for policymakers and others.

I. Coping with a "Paradigm Shift" in Communications

The first session was opened with a presentation by John Hindle, Director, Institute for Information Studies, a joint program of Northern Telecom, Inc., and The Aspen Institute. Hindle proposed the idea that we are in the midst of a massive "paradigm shift" — from the industrial age to the information age — in which many people continue to cling to "old" assumptions and beliefs despite the emergence of a fundamentally different reality.

To illustrate this concept, Hindle played a video clip in which a series of playing cards were flashed on the screen for milliseconds, and then progressively slower. At a certain point it became evident to sharper eyes that the traditional playing-card shapes (such as diamonds or clubs) were not appearing in their customary colors (i.e., the diamond was actually black; the club was red). The point: Paradigm shifts can be hard to detect when they run contrary to one's habitual modes of perception. Furthermore, an "old" paradigm is likely to last far beyond its usefulness. This is especially true as new electronic technologies evolve more rapidly than the policy structures designed to govern them.

Monroe Price, Dean of the Benjamin N. Cardozo School of Law at Yeshiva University, interjected that the playing-card metaphor of a "paradigm shift" should provoke the question, What is fundamental to the paradigm — the shape of the suits or the color? In other words, Price cautioned, one must carefully assess what is fundamental to a medium; it may not be obvious.

One major impetus for the paradigm shift in communications, said Hindle, is the digitalization of electronic media, which has made possible their convergence. Facsimile machines combine printed text and telephones, for example. Interactive video disks combine personal computers, television and sometimes printers. This convergence of media makes it more difficult to apply conventional definitions even to familiar technologies. In 1992, for example, American business will use the nation's telephone network more for non-voice transmissions between machines (data, fax, etc.) than for conventional human-to-human conversations.

Andrew J. Schwartzman, Executive Director of the Media Access Project, a citizens' advocacy group, warned that new electronic technologies, however novel or different, do not necessarily imply a paradigm shift. "Cable was supposed to provide all the channels we would need," said Schwartzman, "yet here we still have fights over must-carry and inadequate channel space. This is the 'abundance' everyone predicted — but where is the 'abundance'?" Schwartzman later added, "Is every possible innovation in telecommunications worth having?" noting that many innovations are accompanied by huge costs, modest benefits and inequitable access.

The group's prickly reaction to some of Hindle's technological predictions prompted Daniel Brenner, Director of the Communications Law Program at UCLA School of Law, to wonder aloud what might account for participants' "bristle factor." Although the question was never fully resolved, one participant suggested that the lawyers around the table may dislike the idea that technology may have its own imperatives that cannot be readily governed by law. Conversely, technologists may not appreciate how law and policy are needed to ensure stable markets and clear, predictable legal rights. In any case, there was a general consensus that the existing regulatory structure for telecommunications has been rendered obsolete by new electronic media.

If the paradigm is indeed shifting — no one really disputed that notion — what is the essence of the old paradigms that are waning? Which elements of the old models ought to be jettisoned, and which salvaged?

II. The Old Paradigms and How They Worked

Charles Firestone began the second session by describing the three major legal paradigms that have traditionally governed communications media. These include:

The private model, based on a laissez-faire marketplace of ideas, holds the interests of the press as paramount. This model assumes that a free market actually exists and thereby ensures "diverse, antagonistic sources of information" that are necessary for a democracy.

The trustee model, as articulated in the Red Lion case of 1969, holds that the interests of the public are paramount. The customary rationale for the trustee model is the inherent scarcity of broadcast frequencies, which requires government allocation and licensing of the broadcast spectrum. In return for the privilege of holding a license, broadcasters agree to act as a trustee for all those who are necessarily not able to hold a license, i.e., individual citizens.

The common carrier model, derived from the "natural monopoly" regulation of railroads and telephone systems, holds that the interests of individuals are paramount. The common carrier model ensures equal access to all at reasonable rates.

Although these three models are the predominant forms of communications regulation, the new electronic media have forced hybrid approaches. Cable television is a case in point. It has some characteristics of a natural monopoly (the common carrier model); there is a scarcity of channel space in absolute terms (the public trustee model); and there is some degree of competition, both between cable and other television media and among cable channels (the private model).

The "purity" of the three models is being challenged, noted Firestone, by:

- *Technological changes*, which include the digitalization of all electronic media; the merging of video and computer technologies; the expansion of broadband delivery systems; and the development of interactive capabilities.
- *Economic changes* which include the declining cost of computing and transmitting; the entrance of new competitors to the market; the reduction of regulatory costs as companies expand globally; and the increasing vertical integration of companies, with all the synergistic advantages that implies.
- *Deregulation* in communications industries, which includes the abolition of the Fairness Doctrine; the 1984 Cable Act; and the Modified Final Judgment that broke up the AT&T telephone system.

Having outlined the primary paradigms of communication regulation, Firestone invited participants to challenge, modify or affirm them. Steven Shiffrin, a professor at Cornell Law School, said that the public trustee model need not be justified by scarcity; it could and should be affirmed on its own terms, as a government subsidy to free speech.

Monroe Price suggested that the three paradigms of regulation could be considered "superficial" manifestations of deeper principles. The common carrier model, for example, draws its legitimacy from our more basic commitment to democratic values: Everyone should have equal, fair access to the means of communication.

Tracy Westen, a professor at the USC Annenberg School of Communications, proposed two more inclusive communications paradigms: a laissez-faire, decentralized model, commonly associated with the print media, and a "forum" model, in which government sets ground rules for the exchange of ideas, commonly associated with the mass media. "Which paradigm should apply to the mass media?" Westen asked, noting that broadcasters often cite either paradigm, as convenient, to justify whatever policy goal is being discussed.

But Steven Shiffrin objected that his idea of "government-subsidized speech" — the justification for the public trustee model — does not fall into either of Westen's categories. Nor does the model of "diverse, antagonistic sources of information," as set forth in the 1945 Associated Press case, have any relevance to children's programming. Indeed, even though that model purports to be content-neutral, it is in fact captive to commercial interests, complained Shiffrin. An advertiser-supported medium of "diverse, antagonistic sources" promotes a "pro-materialistic, hedonistic culture." Shiffrin urged that we step back and ask a more probing, fundamental question, "What kind of culture do you want to promote?"

Shiffrin's point gave rise to an extended discussion of what should be the basic goals of our communications systems. Firestone suggested that participants assemble a list, which resulted in the following compilation.

Goals of the Nation's Communications System

1. A diversity of voices
2. Diversification of ownership
3. Universal access
4. Profit
5. Entertainment
6. Cultural equality
7. Preserve national identity and maintain status quo through consumption of people's time
8. Informed electorate
9. Education
10. Peer approval & act as a check on government
11. Satisfy curiosity
12. Ensure privacy; the freedom not to speak
13. National security

In reviewing the list, Monroe Price suggested that "the differences between paradigms may not be as great as we think." In either the public trustee or common carrier model, "government has to have an agenda. Isn't that the problem — government advancing diversity [of voices] via government delegation or public trustees? Doesn't that just legitimate greater government control?"

Shiffrin responded: "Government does, and must, intervene in the market to make content distinctions in media." If only to nurture a market into existence, or later to subsidize it with legal protections, government intervenes in media markets, he said. Yes, the government intervenes, conceded Robert Corn-Revere, Legal Assistant to FCC Commissioner James Quello, but it should not control. Corn-Revere objected to Shiffrin's contention that the licensing process is a form of business subsidy, which would indeed legitimize government control of electronic media.

This is really an irreconcilable paradox, pointed out Frank W. Lloyd, an attorney with Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., who represents cable interests. "The media are private, but they use public facilities — airwaves or streets." Even the print media benefit from government involvement, in the form of postal service.

Andrew Schwartzman complained that this argument casts government in black-or-white terms; he argued for a more textured appreciation for government intervention in markets. "Let's look at government as a participant and guarantor [of desired goals] in cases of market failure." That is the role government played in bringing about universal telephone service, he noted.

In an attempt to see how the previous list, "Desired Goals of the Nation's Communications System," comports with the First Amendment, Firestone invited participants to itemize the goals and values of the First Amendment.

First Amendment Goals and Values

1. Free marketplace of ideas
   (satisfy curiosity; diversity of voices, diversification of media ownership)
2. Self-expression
3. Safety valve for discontent/dissent
4. Dissent (not simply as safety valve or as a check on government)
5. Self-government/informed electorate
6. Promote change
7. Check government excesses

Robert Corn-Revere objected to the very idea of enumerating the goals of the First Amendment. By implication, that enterprise sanctifies regulatory paradigms that might rein in free speech rights. "We circumvent the First Amendment by assigning it tasks," he argued. "That simply lets you chip away at the First Amendment by defining away what's not covered by it. . . . People use the media for many different reasons. The First Amendment is a goal in and of itself."

But Nolan A. Bowie, Associate Professor at Temple University, pointed out that the actual meaning of First Amendment is not self-evident. "Look at the history of the First Amendment," he said, pointing out that all sorts of free speech rights did not even exist until the Supreme Court "found" them following World War I. For better or worse, the First Amendment comes freighted with the moral/policy assumptions of a given period in history, he said. Schwartzman essentially agreed with Bowie, that the First Amendment must be considered in its political context. How else to explain the campaign for a constitutional amendment to ban flag desecration? Legislators and judges unavoidably bring certain policy assumptions to their understanding of the First Amendment.

Indeed, added Monroe Price, the government has asserted speech rights for itself on many occasions. Through Voice of America and Radio Marti, the government has projected its own agenda of "directive, culture-bound speech" in attempts to change societies. "We don't necessarily think that government doesn't, or shouldn't, use media to change the culture," he observed. Government also has claimed certain speech rights for itself, others noted, in the form of Section 312 of the Communications Act, which provides access to the airwaves for federal political candidates. Anti-drug publicity campaigns are another example.

Brenner was troubled that some partisans claim over-inclusive speech protection based on the First Amendment. "Once you characterize a problem as a First Amendment problem, you can get greater protection. . . . What if the government military PX decides to sell Lee's jeans instead of Levi's, or sells one book instead of another? How do we differentiate the First Amendment from other policy concerns?"

Corn-Revere replied that "economics and First Amendment considerations are related." One cannot summarily separate the two. At the same time, he warned that the scope of the First Amendment should not be dictated by mundane examples. "If you don't discuss the First Amendment in lofty terms, you trivialize it."

Henry Geller agreed: "You really do have to look at lofty purposes. Libel and obscenity are outside of the First Amendment precisely because judges have struggled with its goals. If you just stop with what the Framers wanted, you wouldn't have any breathing room," said Geller, noting how Near v. Minnesota in 1931 and New York Times v. Sullivan in 1964 dramatically expanded the scope of the First Amendment.

III. Broadcasting and "Scarcity": The Geller Critique

Is "scarcity" of broadcasting frequencies still a valid rationale for maintaining the public trustee model of regulation? Henry Geller opened the third session by addressing this question.

The short answer, according to Geller, is yes. That is because the government, when it first allocated the right to use the public airwaves, rejected options that would have enhanced public access, such as a division of the broadcast frequency into months or days so that different parties could have access, or the creation of "access periods" or a common carrier. Instead, Congress gave exclusive, long-term control over frequencies to single licensees. As a tradeoff, it only made sense to make licensees trustees for everyone else who was necessarily denied access to the airwaves.

The Supreme Court has upheld the public trustee model of broadcast regulation on numerous occasions, beginning in 1943 with National Broadcasting Co. v. U.S. and in 1969 with Red Lion Broadcasting v. U.S. — as well as in numerous subsequent cases such as NCCB and League of Women Voters.

Is the public trustee model still constitutional? "Sure," said Geller, "unless the Court overrules Red Lion. People forget that Red Lion is a radio case. It's stupid and silly to argue that [the public trustee model for broadcasting] is constitutional with 7,000 radio stations in 1969 but not with 10,000 now, or with 32 radio stations in Washington, D.C. [1969], but unconstitutional with 41 [now]."

"The real question," Geller argued, "is, Will Red Lion be overruled? I think it's unlikely, because it would be very disruptive to overrule it." He pointed

out that people denied broadcast licenses would clamor for access under new terms. More ominous, perhaps, House Energy and Commerce Committee Chairman Dingell has said that if Red Lion falls, he will push for spectrum usage fees and auctions for broadcasting — a prospect that would make broadcasters apoplectic.

Not only would a powerful lobby be enraged by the elimination of Red Lion, said Geller, but it could well be gratuitous. "The new technology cannot be stopped. Just wait until early in the 21st Century and broadcasting will be in its old age. . . . You'll have hundreds and hundreds, or thousands, of TV stations going into the home. Truly, there will be no scarcity at all. Today there is still scarcity."

Geller's overall assessment of the public trustee model of regulation: "The concept has been lousy policy for the past fifty years, and it's even worse today." The model has never worked well, explained Geller, because there were never clear, objective, well-enforced rules for meeting "public interest" obligations. Furthermore, any FCC rules could not deal with the quality of programming, because any such legal standards would be too subjective and violate the First Amendment. While there were some minimal quantitative guidelines to the staff for processing renewals in the 1970s (which were eliminated in the mid-1980s), no rules, with specified amounts of local and informational programming were ever adopted.

Public-interest regulation, Geller claims, "has always been a charade — or as Ronald Coase says, 'a wrestling match full of grunts and groans signifying nothing'." Over the last decade, however, Geller thinks that "it's really gotten honest: postcard renewals of licensees, trafficking of licenses, half-hour commercials for children . . . anything goes. So the joke has gotten clearer. But it was always a joke, because of the failure to follow through with objective, effective regulation."

Yet Geller is also "pessimistic" that the public trustee model will be overthrown in the 1990s, despite its inherent weaknesses. "Broadcasters like it. They're a weak lobby, but they're good enough to lobby this one." One wild card, Geller noted, is the outcome of the Marriott-owned First Media Corp.'s pending challenge to the FCC prime-time access rule. That challenge seeks to apply the principle used by a federal district court in striking down the Fairness Doctrine (that it unconstitutionally restricts broadcasters' free speech) to the prime-time access rule. If successful, Marriott's challenge could also undermine the FCC's ability to regulate indecency, Schwartman said, and begin to make the public trustee concept an empty shell. Yet Geller believes FCC Chairman Sikes is unlikely to go down this path. (Geller's own ambitious alternative to the public trustee model is described below, on page 13.)

Won't there be some cases that come before the Supreme Court in the 1990s that will challenge the scarcity rationale? "I'm not sure there will be," Geller opined, unless the Fairness Doctrine makes its way to the Supreme Court, and even then it could avoid addressing the scarcity rationale.

In any case, Geller perceives great danger if the FCC or the courts expand the principle that a given public-service requirement (such as the Fairness Doctrine) violates the First Amendment on the grounds that it is not "narrowly tailored" to a substantial government purpose, in light of the explosion of outlets and consequent diversity of programming. "You could say the same about community issue-oriented programming, or equal time, or reasonable access, or children's programming. . . . If every time you require public service, you're interfering with broadcaster autonomy, what's left of the Communications Act?"

IV. Reactions to Geller and Alternative Paradigms

Tracy Westen questioned the value of justifying the Fairness Doctrine — or any broadcast regulation — on the existence of spectrum scarcity. "I personally don't think that scarcity is the best justification for broadcast regulation," he said, pointing out that scarcity can be defined either in absolute terms (how many outlets are there?) or relative terms (does demand exceed supply?). "The problem with basing broadcast regulation on either of those two notions is that it is ultimately factually based."

If there is going to be a First Amendment rationale for broadcast regulation, said Westen, it should derive from the government's legitimate role in allocating the broadcast spectrum. The medium is useful only if government mandates "rules of the road" for allocating access and ensuring clear signal transmission. "If government could constitutionally turn broadcasting into a common carrier, then it certainly could mandate 'less drastic alternatives' such as the current system," said Westen.

"But follow that through," warned Henry Geller. "Suppose the government could allocate a million channels." At some point the government's rationale for interfering with the autonomy of broadcasters would run afoul of the Tornillo decision, in which the Supreme Court rejected government-mandated access to the print media.

Westen agreed that if there were a million channels, "the government may not need to intervene, but it would still have the right to intervene." Its right

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would derive from the inherent need for "rules of the road" in broadcasting — something that is not needed for The New York Times and other print media. A government role in broadcast regulation is valid as a way to maximize everyone's free speech, he said. Geller remained unconvinced: "It has to be the scarcity that allows [the government] to do it. . . . Interfering with the autonomy of speakers in an abundant media environment would not be justified."

As a point of history, Nolan Bowie pointed out that the first instance of government regulation of broadcasting was the Wireless Ship Act of 1910, which was enacted to save lives and property. "Scarcity" was not the rationale. In any case, scarcity is a somewhat malleable concept, said Bowie, in light of the FCC's proposal to give existing licensees another 6 megahertz of the broadcast spectrum to facilitate conversion to high-definition TV. Doesn't this proposal demonstrate that there is indeed scarcity? Available spectrum space is being sopped up by incumbents, essentially freezing out newcomers who might want access to the airwaves.

So how can citizen access to broadcasting be facilitated without violating the First Amendment rights of broadcast licensees? Westen's conclusion: "You will only succeed in preserving access in broadcasting if you can distinguish broadcasting from print." But if you try to base that distinction on scarcity, warned Westen, you immediately encounter trouble because the print media are less abundant in some markets than broadcast media.

Henry Geller says that the place to start building a credible alternative legal theory is United States v. O'Brien, the 1968 Supreme Court ruling that established four tests for determining whether a restriction on free speech is constitutional. As a matter of legal pragmatism, Geller said new legal theories should analogize to print or existing paradigms of broadcast regulation.

The O'Brien decision holds that a federal law prohibiting the burning of draft cards is not a violation of the First Amendment. The Court held that such a government restriction on speech is justified "if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

Even though the O'Brien test was in fact applied to broadcasting in League of Women Voters, Geller has doubts that the last test of O'Brien truly vindicates the Fairness Doctrine — namely, that the government restriction on speech is "no greater than is essential." "Access is a much better [means of promoting diverse voices] than fairness," said Geller, "because fairness requires a subjective, behavioral judgment. Access is merely first-come, first-served."

"This is an odd discussion," interjected Monroe Price, Dean of Cardozo School of Law. "We are encaptured by an old paradigm. We're masters of an old paradigm and seem to have some need to hold on to it. . . . Is this an interpretation of the First Amendment we should be striving for?" Instead of fighting a rearguard action, Price urged participants to focus on the goals of the nation's communications system (as listed above), and then try to forge a new definition of the First Amendment that is better suited to the new electronic media.

Lee Bollinger, Dean of the University of Michigan Law School, also challenged the underlying assumptions of the discussion: "It's not completely clear to me why a completely open marketplace is the most desirable state of affairs. . . . That seems dubious to me." For Bollinger, the search for a new theory of the First Amendment ought to center around the deficiencies of public debate, such as the exclusion of speakers because they cannot buy access or because some people cannot be heard.

Bollinger explained, "My theory is that the First Amendment is concerned with democracy. It is needed not just to preserve public discussion, but to enhance its quality. The question then becomes, to what extent can we afford to use some forms of public regulation to correct it? And which forms are best? Subsidies, because they are the safest? Public access? Regulation for only one branch of the media? Etc."

As for the scarcity argument, Bollinger finds it a red herring. "You don't get beyond comparisons with the print media simply by pointing out the interference or scarcity problems in broadcasting. You've got to say something more [to make a meaningful distinction]. If by scarcity you mean there's more demand than supply, again, that's true of everything, especially when you don't charge anything for broadcast licenses."

"But you have to make some distinction about why regulation should apply to broadcasting but not to print," Geller objected. "At least for the 1990s, you have to figure out some way to get around comparisons with print. . . . You need a 'hook' like 'scarcity' to justify public regulation." The need for a hook is an expediency, Geller confessed. It is a legal pretext needed primarily to satisfy the Supreme Court. By the 21st Century, however, Geller predicts technological innovations will make the need for a hook gratuitous.

Daniel Brenner of the UCLA School of Law proposed his own regulatory paradigm to advance First Amendment interests: "I'd impose a spectrum fee on broadcasters [to be used for direct financing of children's programming, etc.] and then deregulate them with one exception." Given the profound impact that electronic media have on political campaigns and referenda (as opposed to impact of the print media), Brenner believes that it is possible to make a constitutional argument for a low-cost right of access for candidates and referenda sponsors.

The advantage of this legal theory, argued Brenner, is that "you don't have to go through a nickel-and-dime O'Brien analysis on all kinds of content regulation. You can say that there's a compelling interest that the state has in the kinds of governments it elects." One can avoid the more problematic, complex forms of constitutional analysis and even sidestep the scarcity justification for regulation.

James R. Hobson, Washington Counsel for the GTE Corporation, suggested that perhaps a plausible rationale for regulating electronic media is the "transience of oral communications." While speeches in the park or telephone conversations are usually heard from the start and in a context, broadcasting has a random, fleeting quality that perhaps impels us to regulate it. Hobson cited as an example the "Seven Dirty Words Case" of Pacifica I, which found a George Carlin comedy sketch indecent.

"That's the 'magic box theory'" of television proposed by attorney Joel Rosenbloom, said Daniel Brenner. "Ultimately the reason we regulate television is because it's magic. It's special, people are in awe of it." Television's power and wide impact have also been used to justify its regulation, added Charles Firestone.

Following these remarks, Robert Corn-Revere expressed alarm at the drift of discussion. "You are looking for constitutional justifications for policy preferences," he charged. "That's what David Stockman called 'the triumph of politics.' Any interest group can do that. Any group can identify what, from its perspective, is a market failure. The radical right-wing can say that indecency isn't a part of any serious exposition of ideas, and that it can constitutionally be eliminated." Corn-Revere argued that one must first define the area of permissible government activity, and then figure out what policies fit within its scope — not vice-versa.

In an attempt to make some important distinctions among different kinds of broadcast regulation, Firestone proposed four categories:

Structural regulation, which seeks to diversify control of the media and promote competition;

Access regulation, which gives individuals and political candidates a right of access.

Speech enhancement/behaviorial regulation, which may require certain amounts of programming for children and public affairs. (Fairness Doctrine and Equal Opportunity could also be regarded as forms of access regulation.)

Content suppression regulation, which bans "indecent" speech from the medium.

These categories encompass much of the history of broadcast regulation, said Firestone. Are they still valid today?

Geller believes that the latter two forms of regulation, speech enhancement and content suppression regulation, ought to be struck down because the same ends can be achieved less intrusively through other means, namely structural and access regulations.

But Bollinger challenged Geller's claim that the Fairness Doctrine just hasn't worked very well. "I think it's very hard to estimate the symbolic impact of something like the Fairness Doctrine," he said. "In the late 1960s and early 1970s, it was applied fairly regularly in some fairly dramatic cases — and then it sort of wound down. Some people take that as a failure. I take it as a noble effort at reforming public discussion that may have had enormous symbolic consequences."

Daniel Brenner agreed, citing his personal query to Dan Rather about whether the Fairness Doctrine is good or bad. Rather told Brenner that he does not oppose the rule because it serves to check the public perception that television is too powerful. In short, it has immense symbolic value. And indeed, said Brenner, the public does think television is too powerful, as evidenced by the public response to the movie "Network" and viewer complaints to the FCC about subliminal persuasion on TV.

Public fears about television's power should not justify regulation, said Brenner. But Monroe Price objected. Especially in its impact on the democratic process, broadcasting is intrinsically different from newspapers, Price noted. "Is there some way we can incorporate this difference into our legal regulations?"

This is precisely what Robert Corn-Revere would rather avoid: "To the extent that you worry about the commercial system exerting too much power, there seems to be relatively little concern about the government coming in as some sort of proxy and exerting some sort of overarching control." To which Price replied, "That's what it's all about — finding some balance between the two."

V. The Hybrid First Amendment Rights of Cable Television

Frank W. Lloyd, an attorney with Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., opened the fourth session discussing the history and rationales of cable regulation.

As mentioned earlier, cable has similarities with the public trustee obligations of broadcasters, the natural monopoly of telephone companies, and the unregulated speech of the print media. Like broadcasting, cable is bound by numerous structural regulations that limit its ownership of other electronic media.

Given its hybrid status, the courts have not found it easy to define the nature of cable's First Amendment protections. In the Preferred Communications case, the Supreme Court declined to make a First Amendment determination on whether a cable company had a right to provide service to a given locale, said Lloyd. The Court has also never ruled on the legitimacy of public access requirements for cable. The justifications for First Amendment regulation of cable are generally based on cable's channel scarcity or alleged natural monopoly.

Daniel Brenner pointed out that the proprietary relationship between city governments and cable operators offers another basis for cable regulation. Cable systems, after all, gain real, tangible benefits from the city's power of eminent domain and non-transient use of city streets. In any case, said Brenner, cable has shown a decided ambivalence about whether it wants to be regulated or not: "There are certain benefits of a monopoly franchise for which cable might be willing to give up some of its First Amendment privileges."

A discussion ensued about the "ownership rights" of a city in cable systems. What kinds of city involvement in a cable system can justify regulation that might limit a system's free speech?

Robert Corn-Revere suggested that cable would have no obligations to a city whatsoever if it could negotiate private rights of way, via a utility, for example. As for use of city streets or telephone poles, that is a de minimis use that hardly justifies substantial encroachments on cable's First Amendment rights. Andrew Schwartzman suggested, however, that despite its private ownership, cable regulation could very well be justified under a "public forum" doctrine, which is often applied to public parks and shopping malls.

The core problem in assessing the First Amendment rights of cable systems, said Brenner, is that "the law has not come to grips with the right to distribute," i.e., second-party distribution of another speaker's message. "When does a packaging of a message stop being speech and become a commercial concern?" asked Brenner. "At some point the transaction loses its character as speech. How different is it to package six tennis shoes and six cable programs?"

Economic issues often masquerade as First Amendment concerns, complained Brenner, extending First Amendment protection far beyond any reasonable limit. For example, the president of the Home Shopping Network has declared that must-carry rules should be considered constitutional — yet "he was really talking about money that he could avoid paying [to cable MSOs]," Brenner argued. "The First Amendment offers a convenient vehicle for driving through commercial barriers, undermining what the First Amendment should be protecting."

Angela J. Campbell, Associate Director of the Citizens Communications Center of the Institute for Public Representation at Georgetown University Law Center, agreed that cable is primarily in the business of packaging programming, not originating it, and that this function is distinctly different from the function of a newspaper.

But what about newspapers (and cable systems) that edit material that goes on the air, asked Charles Firestone. Newspapers choose which columnists and features to run, and some cable systems edit their own programming, like News 12 Long Island. But editing is different from re-transmitting, said Andrew Schwartzman, and cable is usually prohibited from altering its retransmissions of broadcasting. On the other hand, cable systems have been prosecuted for showing allegedly obscene programs, most notably in the "American Ecstasy" case, other participants pointed out.

Even conceding that cable does have clear First Amendment rights when it originates programming, said Brenner, how are we to distinguish between a cable operator's decision as a packager/distributor to carry the most popular cable networks versus the drug store that sells the most popular chewing gums?

They are the same! exclaimed many participants. Brenner persisted by expanding his analogy to a discount packager of programming that wanted to compete with cable, via the cable. Brenner asked: Why should First Amendment be allowed to be invoked to fend off legitimate economic competition, especially when it's all in the context of economic packaging, not original expression?

Dan has raised a good issue, conceded Westen, "but there's a different solution to it." Like cable, the sidewalk in front of White House is a limited public forum. But government has the right to choose a content-neutral means of deciding who gets to use the sidewalk. Westen's point is that "you can resolve [the issue] without denigrating the speech interests of ev-

eryone who wants to get on to the sidewalk. You don't have to say that their speech interests are less because they're a packager."

Firestone urged participants to articulate the underlying reasons for regulating cable. Are they valid?

Lloyd said that the "interference rationale" that is commonly cited for broadcasting is a similar justification for the regulation of cable. In cable's case, there had to be "an orderly manner of using limited public resources," such as telephone poles and streets. Lloyd predicts that direct-broadcast satellites (DBS) will be affected in same way, if only because there are a finite number of available DBS slots. The core issue in all these cases, said Lloyd, is, "Can government extract controls for its favors?"

In contemplating cable regulatory schemes, Schwartzman said it may be fallacious to view cable only as one-way program service when fiber optics and ISDN networks (Integrated Services Digital Network) are just over the horizon. In the 21st Century, when one cable is doing everything, the rationale for regulation will be universal service again, said Schwartzman. Then cable will truly be a natural monopoly, and any intrusions on the cable owner's purported First Amendment rights will be justified by the government's desire to ensure universal service.

But can cable or other technologies truly be regulated as common carriers? And won't they often use their economic clout to freeze out competitors, undermining the goals of common carrier regulation? Geller cited the failure of NBC News to launch a cable news program that would have competed with Ted Turner's Cable News Network, largely because TCI, the large multi-system operator on whose board Turner sits, refused to run NBC's proposed channel. Even though the 1984 Cable Act officially authorized leased access to cable systems, theoretically offering the possibility of competition, Geller said that in practice leased access has been a "dead letter."

Practically speaking, common carriers can and do discriminate against the content of what they carry, noted Robert Corn-Revere, who cited the recent case of satellite carriers in Alabama refusing to carry "adult programming" and telephone companies refusing to carry dial-a-porn services. The actual behavior of common carriers may deserve special attention: common-carrier telephone companies, contemplating the coming age of fiber optics communications, are seeking regulatory permission to provide video programming. But even if permitted to do so as common carriers, they may be able to discriminate as to content of the programming.

VI. Is Common Carriage Incompatible With the First Amendment?

James R. Hobson, Washington Counsel for GTE Corporation, opened the fifth session by outlining the history, premises and goals of common carrier regulation.

Common carriers — historically, telephone or telegraph companies, and other "natural monopolies" such as railroads — are intended to provide nondiscriminatory, universal service to the public "at reasonable rates, terms and conditions," explained Hobson. The history of common carriage regulation is largely a history of trying to assure that these goals are fulfilled. A related problem has been how federal and state jurisdictions would divide up regulation of common carriers.

In however prosaic a manner, said Hobson, common carriage is about facilitating the spread of ideas, and to that extent telephony rises to the dignity of First Amendment protection. This is explicitly reflected in the 1934 Communications Act, which allows for a discounted "press rate" analogous to the second-class postal rate for newspapers and magazines.

But when is a common carrier not a common carrier? Hobson noted that over the past twenty years a hybrid called "private carriage" has taken root and flourished. Technically, private carriage limits its customer base to businesses, a nominal distinction that allows them to evade common carrier regulation and undercut the revenues of common carriers.

Telephone companies ("telcos") themselves are stretching the definition of common carriage, raising questions of how the First Amendment should apply to common carriers. The issue arose when telcos began providing a variety of information services for third parties, such as 900 telephone number polling services and assorted dial-a-message services (prayers, jokes, sports scores). In a sense, telcos are acting as packagers: they provide billing services to end users on behalf of information providers, with whom they split the revenues.

Future technologies such as fiber optics also promise to stretch the traditional common carrier functions of telcos. Fiber optics will permit interactive communication, combined video and voice transmissions, and rapid downloading of data (e.g., so a movie would not need to be transmitted in real-time, over two hours). Although telcos have been prohibited since 1970 from providing video programming within their local exchange networks, telcos are eager to enter this potentially lucrative new market. Ultimately, telcos would like to provide a "video dial-tone," in which it would be allowed to transmit voice, data and video over a national fiber optic network.

The huge technological promise of fiber optics, however, quickly raises knotty questions about how to regulate this new medium and define the free speech rights its owners possess. Should common carriers have First Amendment rights over their own networks? Or is unfettered free speech tantamount to unfair economic competition with other media, and thus intrinsically incompatible with common carriage? Can the provider of the communications conduit also be an information (or video) provider — while still offering fair access and rates to competitors?

One conference participant asked what the justification is for prohibiting telcos from providing a "video dial-tone." The most-cited answer is the fear that telcos will exploit their governmentally granted monopoly over an essential service (telephony) and use their guaranteed rate of return to unfairly cross-subsidize their "free speech" ventures (various information and programming services).

Frank Lloyd noted that Harvard Law School scholar Lawrence Tribe has criticized as a direct restraint on free speech the AT&T modified final judgment that prohibits Bell companies from entering electronic publishing. Even if this restraint is an "incidental" effect of government intervention for other ends, O'Brien requires the government to demonstrate a "substantial interest" for its intervention to be constitutional.

Hobson, whose employer, GTE Corp., would like to offer video programming and other services over fiber optics, contended that the restrictions on common carriers are unfair: "Are we forever to be bound by reasons of history to be only common carriers, able to offer only a little programming, and cable the reverse [programming with only a little common carriage]?"

The "video dial-tone" is not going to arrive automatically, Hobson warned. If telcos are eager to offer their own information and video services, it is in part because telcos want some assurance the the new fiber optic networks will actually be used — so telcos can reap a return on their investment for building a vast, expensive communications infrastructure. As for fears that telcos might abuse their common carrier status to subsidize their own information services, Hobson said the federal government could prevent such abuses. He cited recent government antitrust actions against airlines' flight reservation systems, which were accused of unfairly favoring their carriers' schedules over the schedules of competitors.

The high risk of such abuses is precisely the point, even if regulators are there to enforce the law with uncertain vigor, said Henry Geller. People are understandably fearful that telcos would dominate the new medium much as they have come to dominate another fledgling industry, cellular telephone. The challenge, Geller contends, is to find a way for the new model of electronic video publishing (videotex) to emerge without telcos utterly controlling it. Yet the telcos are probably right, Geller noted, that there must be some core service such as an Electronic Yellow Pages if a nationwide videotex industry is going to develop — a point that Judge Greene never disputes, says Geller, without offering any remedies.

Geller faulted the telcos' political and legal strategies as "too extreme," particularly in brashly asserting that telcos should unquestionably be entitled to be common carriers and information providers — and that no reasonable person ought to object to that scheme. "That's a losing argument," Geller claimed. "I don't think people trust you."

Instead of telcos' demanding entrance to this new market as a First Amendment right, with no government regulation, Geller suggested that telcos recognize the legitimate fears of critics and show good faith by seeking to provide only five channels of video services, as a provisional test. The move would avoid the impossible political battle of converting cable TV into a common carrier, yet it would "prime the pump" and help bring the new video publishing market into being.

The reason the Bell operating companies (BOCs) are taking an "extreme" position, replied Daniel Brenner, is that they do not want to be the "dull-witted mules" ordained by the AT&T modified final judgment. They realize that fiber optics is a great technology and a perfect means to "grow the business" in creative, lucrative new directions. Why should they rein in such ambitions?

If a ubiquitous fiber optics network is neither inevitable nor imminent, its huge potential makes it irresistible for its proprietors to make new, more urgent claims to traditional First Amendment protection for their medium. The question may be, How can — or should — these new claims be logically integrated or reconciled with existing First Amendment law?

VII. Proposed Theories of the First Amendment in the Era of Electronic Media

The sixth and seventh sessions of the conference were devoted to proposing, and then evaluating, various new theories of the First Amendment that might resolve the dilemmas discussed so far. Can one sensibly propose a universal, coherent approach to the First Amendment that does not unfairly discriminate against a particular electronic medium? And if no unified approach is possible, what still needs to be regulated in the video dial-tone era — and by what justifications?

Alfred C. Sikes, Chairman of the Federal Communications Commission, joined conference participants for this session, more to listen to discussion than to declare his own grand theory or academic approach to the issue — especially since he had not attended the earlier sessions. Still, as the leading advocate of the "video dial-tone," a proposal Sikes put forth in the Telecomm 2000 report in 1988 when he was Chairman of the National Telecommunications Information Administration, Sikes had a keen interest in the thoughts of this group.

After reviewing some of the current regulatory trends in broadcasting and cable, Sikes predicted that the 1990s will be characterized by greater competition in electronic media. The reasons have to do with the declining costs of transmitting, storing and processing information, and the dramatic growth of channel capacity. Sikes believes that the end result of these and other factors will be a "massive reduction in the entry barriers" to electronic media. In this new environment, Sikes foresees "the destruction of scarcity and barriers to accessibility, resolving many of the questions that the FCC has faced in the past."

As for the First Amendment implications of local exchange carriers (LECs) getting into videotex, Sikes said he "cannot imagine telephone companies having an entry price [into either cable or videotex] that does not include common carriage."

With this preface, Firestone invited participants to outline their new theories of the First Amendment for the electronic age.

1. The Property Rights Theory of the First Amendment

"The role of government is to create a property rights structure that serves as a foundation for a competitive private marketplace, where that is possible," declared Mark S. Nadel, Associate with Wood, Lucksinger & Epstein in Washington, D.C. From this premise, said Nadel, there are three categories of government action with respect to the First Amendment.

1) Where a competitive private marketplace is functioning effectively, the government should keep its hands off, with two qualifications. First, it should be sure to collect an appropriate fee for the use of public resources by private firms. Second, it can choose to finance libraries, children's programming, or free public access to computer bulletin boards, cable TV production facilities, or public forums.

2) Where a competitive marketplace could exist, but does not (due to natural monopoly or other conditions), the government should create such a marketplace, said Nadel. Thus, just as the government's common-carrier postal service promotes a competitive private magazine marketplace, and its common carrier regulation of the telephone network promotes a similar market in electronic publishing, so too other media may be regulated as common carriers.

Certainly cable TV systems could be regulated as common carriers so that program producers could operate as unregulated private speakers. If other considerations prevent the government from treating broadcasters as pure common carriers, the First Amendment should at least require a right of paid "common carrier" access, Nadel argued. Furthermore, the broadcast license could be shared among many speakers by dividing it into smaller units of time.

3) Only in instances where it is impossible to structure a competitive marketplace should the government be permitted to supervise access decisions, and then only in a neutral manner. Examples of such non-competitive media decisions that might be regulated include the purchasing choices of public libraries and curricula by public schools, as well as the making of grants by the CPB and NEA. Since choices here are unavoidably subjective, the best the government can do is to ensure procedural fairness.

2. The Government-Created Scarcity Theory of the First Amendment

Tracy Westen of the USC Annenberg School of Communications proposed a theory of First Amendment regulation that derives from the government's power to control scarce resources and to maximize use of those resources for speech purposes.

Broadcasting is the prime example. In order for the spectrum to be useful to anybody, government has the authority to issue procedural rules. This authority entails a wide array of choices, from declaring that proprietors of a frequency act as common carriers, to declaring that individuals can control entire, intact channels, with no requirements that the airtime be shared or split in any rigid way (the policy choice that was ultimately made).

Westen believes the government has the authority to say to would-be licensees of broadcast frequencies: "We don't have to give you full control, partial control or even any control of a channel. We could make you a common carrier. But we have the option, or the 'policy space,' to decide not to do that. We could instead give you, say, 95% of the space and reserve the remainder for other, governmentally mandated purposes that meet First Amendment tests. Or we could give you 100% of the frequency if you agree to act as a public trustee and cover all sides of controversial issues of public importance, etc."

What flows from the government's power to divide the broadcast spectrum into smaller and smaller chunks, said Westen, is the ability to negotiate with licensees for what arrangements will hold, or at least consider a range of options that are less drastic than common carriage (excluding any partisan political tests, of course).

The merit of this theory, argued Westen, is that it "provides a way to distinguish broadcasting from the print medium, where the government clearly has no authority to declare a newspaper a common carrier." But government can declare broadcasting a common carrier, if it so chose. The same analysis applies to cable television, where the government has created a form of artificial scarcity by allowing one company to monopolize the available space on public utility poles, even though it has the authority to require the pole space to be shared.

3. The Eclectic Cultural Approach to the First Amendment

Steven Shiffrin of Cornell Law School finds it "highly counter-intuitive that a unified, integrated free speech theory is possible. Free speech interacts with too many interests, in too many complicated contexts, for us ever to hope or expect to produce free speech theory from a single value, or small set of values, that you could lexically order."

While there assuredly must be room for common carriers and the free market, said Shiffrin, "you can't rely exclusively on the market. Government must act as a speaker and subsidizer of speech to benefit certain constituencies, such as children. If we spend billions in educating children, whether through libraries or schools," said Shiffrin, "it seems patently silly that the government would not use the broadcast or cable media to help educate children, or that it would be suspect for the government to operate in that medium."

Shiffrin believes the government must be permitted to operate in any medium, if only because "how we structure the communications system has an impact on what the culture is like. I think we're producing a passive, disengaged citizenry that doesn't participate in elections and is increasingly materialistic and hedonistic." The problem with the electronic media, said Shiffrin, is that it is "a commercially driven medium. We do not have an equal opportunity for non-commercial speech." As a result, broadcasting and cable are "lopsided, unfair systems, from a cultural standpoint."

[At this point, FCC Chairman Sikes interjected a response to Shiffrin—that as the economies of reaching people fall dramatically in the 1990s and beyond, aesthetically pleasing and educational programming will become more commercially feasible. Sikes cited Mark Fowler's predictions that DBS would resemble "a magazine rack," because of the economic feasibility of having 108 channels nationwide. While government may be fit to subsidize children's programming, said Sikes, it it not capable of deciding how many commercials an hour is good.]

4. The Computer Bulletin Board Theory of the First Amendment

James R. Hobson, Washington Counsel of the GTE Corporation, suggested a model of First Amendment protection based on a common carrier model with paid access. Eventually, communication of voice, data and moving video will be possible over a single network, in ways that resemble computer bulletin boards, said Hobson. Communication will be cheap and easy, and there should be no government restrictions on it except fair and reasonable access, consistent with the common carrier model.

Hobson concedes that "we may have to wait for a unified means of technological delivery for a unified First Amendment theory." (Any future unified theory would necessarily exclude the print media, however, said Hobson.) In the meantime, paid access under a common carrier model can and should be promoted in other media, such as cable and even broadcasting.

5. The Print Model Wedded to Common Carrier Theory

Henry Geller proposed melding two models of First Amendment regulation that have worked well in the past, the print media and common carriage. The beauty of this model, said Geller, is that "anyone can say what they want, and there's a common carrier available to do it."

Geller would start by revamping Section 612 of the Cable Act of 1984, which mandates leased access to cable. Currently, this provision is a "dead letter," he said, because if cable wants to thwart use of this provision, any complainant must endure lengthy FCC action, court proceedings, or antitrust enforcement. Geller proposes giving immediate, guaranteed access to cable on a common carrier basis, with "last offer" compulsory arbitration used to resolve any dispute over terms.

Geller would then scrap the public trustee model of broadcasting, establish a unity scheme of regulation for radio, television and cable, and eliminate all content regulations, including indecency restrictions.

(Geller believes an attempt should be made to reverse Pacifica I.) To assure that certain sorts of programming are produced and aired, the government could levy a 3-5% tax on cable revenues and 2-3% on TV broadcasters. The pool of $1 billion or more would directly finance programming for children, public affairs and other desired genres. The advantage of this scheme, said Geller, is that "you have a structure that works for you."

Over the long term, the government should promote the development of a fiber optics network, with telcos serving as common carriers. The process can be primed by allowing telcos to package and sell five channels. After ten or fifteen years of video common carriage operation, when the market has presumably developed, it might be acceptable to allow telcos to compete on an even footing with other program suppliers. Happily, an effective system of leased channels would reduce concerns about vertical integration of ownership, said Geller. While this scenario might be difficult to effect politically, Geller is convinced that it offers the best hope of both fostering competition and the values of the First Amendment.

6. The Partial Regulation/Quality Theory of the First Amendment

For Lee Bollinger, Dean of the University of Michigan Law School, the essential purpose of the First Amendment is to enhance the quality of public debate and decisionmaking. Therefore, the chief question to be addressed is, "How far can you go in reaching that goal, without breaching the First Amendment?"

Shunning any attempt to devise a unified theory of the First Amendment, Bollinger argues that it makes sense to "experiment with regulation" in different media technologies to ascertain what best serves the First Amendment. Bollinger took issue with Tracy Westen's theory of government-created scarcity (#2 above), saying, "That's simply another way of saying that government chose one way of organizing the medium's marketplace over another." Westen's approach is "more a position, not a theory," said Bollinger.

In searching for a new, coherent theory, Bollinger urges policymakers to "cut [themselves] loose from intellectual traps and start afresh." He said that it is not enough to ask whether the First Amendment prohibits or compels a certain action. Agreeing with Monroe Price, Bollinger said "the values of the First Amendment must be foremost" in the search for a theory.

7. The "Separations" Theory of the First Amendment

In forging a new theory of the First Amendment, Daniel Brenner stressed that "it is important to separate public policy considerations from the First Amendment," because there are other legitimate standards for regulating the electronic media that have little to do with the First Amendment.

"My analysis is simple, almost simplistic," confessed Brenner. "What do people want to hear or say that isn't being allowed to be heard or said?" If that question cannot be answered in a specific way, Brenner believes there should be a presumption that the First Amendment is not implicated.

Government intervention that seemingly implicates free speech may well be motivated by other reasons, having to do with public policy interests. As an example, Brenner cited the Lakewood case, in which the Cleveland city government sought to regulate placement of newspaper vending machines. This was not a matter involving the First Amendment issue, said Brenner, but public policy. Similarly, the Preferred Communications case "is not about somebody not being able to say something they can't say," said Brenner. "It's a matter of the right to do business where one wants to. But that's a different set of values and public policy issues [than the First Amendment]."

8. The "Cascading Access" Theory of the First Amendment

The "cascading" nature of Charles Firestone's title comes from the idea that there are priority tiers of acceptable regulation, as described above: structural regulation, access regulation, behavioral regulation, and content-suppression regulation. Policymakers would have to regulate in the top tiers first — to see if they can accomplish the desired policy goals — before moving to the less desirable tiers of regulation.

Firestone's theory requires, first, that there be an adequate communications infrastructure for diverse and efficient electronic communications. If it does not exist, policymakers would be allowed to institute compensatory public policies to help it develop. To the extent the infrastructure does not develop into a fully functioning marketplace of ideas and electronic commerce, regulators could adopt regulations at the next tier down the cascade, viz., promoting access and competition. Thereafter, if open access or competition is impeded, then behavioral or even content-specific regulation might be justified. Firestone agrees with Henry Geller that the best, most desirable forms of communications regulation are structural and access

regulations, and that behavioral and content-suppression regulation ought to be avoided if possible.

9. The Full Human Initiative Theory of the First Amendment

If there is a core value behind the First Amendment, FCC Chairman Alfred Sikes believes it is to promote "full human initiative," which is generally best advanced by free, competitive markets. The presence of natural monopoly requires government intervention, but that determination is not self-evident, Sikes cautioned: "I think it may be easier to demonstrate that newspapers are a natural monopoly than broadcasting." Furthermore, print itself varies enormously in its prestige and accessibility, from major national newspapers to pamphleteers.

The structure of communications regulation, Sikes urged, should recognize that "the most creative, ambitious people are attracted to the fullest opportunities. I don't really believe, for example, that such people want to be involved in mere transport." Thus, the ideal structure for electronic media should not necessarily be common carriers such as telcos, said Sikes, citing the "post-divestiture vitality" of AT&T which he attributes to competition and broader opportunities. Indeed, Sikes said he "wouldn't want to deny the chance for a company to be fully vertical" because such a denial would produce "a chilling of human initiative and skill." Splitting up broadcast licenses into many dayparts, or other such schemes, would have a similar negative result, Sikes contended. It would impede, not enhance, creative initiative.

Having said this, Sikes conceded that telcos should be allowed to compete in video publishing, but only after meeting certain preconditions dictated by their natural monopoly status. Also, government must intervene in the marketplace from time to time to uphold "core societal values," Sikes noted, whether to promote quality programming for children or to ban indecent or libellous programming.

10. The Core Values Theory of the First Amendment

Robert Corn-Revere suggested that to search for different standards for different media is a mistake. "Whenever I hear people talk about the 'print model,' I say, 'Compared to what?'" He said that various court decisions contain dictum that each medium is a "law unto itself," but that the historical trend is to apply full First Amendment protections to new media as they become more established. A 1915 Supreme Court ruling held that cinema was not "speech," but this was reversed almost forty years later. The Federal Radio Commission argued in the Trinity Methodist Church, South case that radio was not "speech," but over time courts recognized at least some First Amendment protection for broadcasting. Eventually, the courts come around to apply First Amendment protections to new technologies, he said, adding that "the separate treatment for broadcasting under the public trustee model is an historical anomaly that, like communism, hopefully will soon fade."

A major problem with a search for a different standard for new media is the lack of any coherent method of analysis. The courts' uncertainty with how to categorize cable television is a case in point. Courts will ask whether cable is more like "print" or more like "broadcasting." Such an exercise is pointless, for it provides no consistent answer.

This is not to say that all media must be treated exactly the same, regardless of their characteristics, said Corn-Revere. Different media justify different First Amendment analyses based on their characteristics, but not different First Amendment standards. In other words, pamphlets can be regulated because they create the problem of litter; sound trucks can be regulated because they can produce excessive noise; cable television can be regulated because system construction generally entails street cuts. But the extent of regulation in each case would be limited to the specific characteristic. Nothing in any of the examples would justify content controls.

VIII. Reactions to the Ten Theories of the First Amendment

Following the presentation of their theories, participants offered a variety of criticisms. Andrew Schwartzman of the Media Access Project was skeptical of allowing common carriers to sell programming over their own networks, as James Hobson's theory would allow. Schwartzman did not think such a "potentially fatal compromise" is either possible or necessary, especially if one believes, as many do, that the video dial-tone is inevitable.

Felix Gutierrez, Vice President of Gannett Foundation, argued that allowing common carriers to offer programming gives them an unfair "jump-start," because "they're not only setting up the [communications] highway but getting onto it first with the fastest cars," i.e., the most profitable services. Telcos' administrative billing systems, which are already well-established, would also give them an unfair, extra advantage.

Steven Shiffrin objected that none of the First Amendment theories proposed leaves much room

for a public trustee model, which Shiffrin believes is not only legitimate in certain instances but desirable. Indeed, one could argue that the public broadcasting system has done a better job of fulfilling the public trustee mission of broadcasting than commercial broadcasters.

Frank Lloyd worried that too many participants assumed that the ideal future is a one-wire or one-carrier broadband switch. "If cable were given sufficient stimulus, by cleaning up the leased access provisions which have not worked as well as originally touted, you could have competition between cable and telcos not only in video but in voice and data." Lloyd said that this was the FCC's original intent in 1970, when it separated the industries; it wanted cable to become a future competitor with telephone companies.

Sure, that would be great, agreed Henry Geller, but with the huge capacity of fiber optics and other transmission systems, it is more likely that one competitor would try to buy out the other. This is something the FCC should steadfastly prohibit lest telcos later try to buy out cable as a way of controlling the market, he said.

Perhaps a more basic question that must be addressed, said Lee Bollinger in an exchange with Tracy Westen, is the extent to which a free marketplace necessarily advances the goals of the First Amendment. On the one hand, many policymakers would hold that once the "rules of the road" for a medium are established and a market is shown to be possible, then government must endorse the marketplace as the best way of advancing the First Amendment. But Westen believes that once the rules of the road are established, government surely can, but is not required to, promote the free marketplace; it is merely one option. Westen argued that government is not compelled to sanctify the marketplace because its proper role is to balance the First Amendment interests of speakers, listeners and media owners.

Robert Corn-Revere took issue with the "underlying premise" of many of the proffered theories, "that government should shape the environment." He worries that government authority to shape the media environment helps justify government control of content. As an example, he cited the broadcast regulations that in effect allowed only three networks and generated Newton Minow's "vast wasteland."

Expanding diversity of speakers through such means as public television or the Government Printing Office is a fine, legitimate government function, said Corn-Revere. "But governments don't want to buy channels from cable," he said, "They want to take them." With electronic communication, we assume that such government confiscation of channels is acceptable, while it is unthinkable for print media.

Tracy Westen replied, "I don't view government as taking channels away from cable, but as not giving them the whole banana in the first place." To which Corn-Revere responded, "But what does government own?"

Westen clarified that he does not put forth a First Amendment theory based upon government ownership of the broadcast spectrum, as Steven Shiffrin does. Rather, he justifies government intervention as necessary to deal with "interference" and establish an orderly forum, thereby maximizing free speech. "Is government taking away speech rights from commercial broadcasters when it creates public TV?" Westen asked rhetorically. "No. It's just not giving them everything. I think government has that right."

IX. Can a Single Theory of the First Amendment Embrace Both Print and Electronic Media?

As the final session grew to a close, Charles Firestone asked the group if any consensus was possible about how the courts should treat electronic technologies across-the-board. Is there a "technology transparent" approach to the First Amendment that no longer treats each individual medium as a law unto itself?

"The problem always comes back to newspapers," said Henry Geller. They are always considered inherently different. Yet isn't it odd that the Supreme Court does not apply an O'Brien analysis to Tornillo and other print media decisions? Geller asked. The Court simply declares, without any constitutional analysis, that statutory access to newspapers violates the First Amendment: "You can't do it."

One reason that it is impossible for a unitary First Amendment theory to encompass both print and electronic media, said Frank Lloyd, is that theoretically, virtually everyone has the ability to publish in some print medium while that is not true for the electronic media. Geller pointed out that to justify regulation of electronic media, a rationale distinguishing print from electronic media is necessary. That is why we have theories of spectrum scarcity, frequency interference, government property and other "hooks," he said.

It just could turn out that the great conceptual divide in First Amendment law between print and electronic media will be rendered obsolete by technology itself, suggested Andrew Schwartzman: "What, after all, is print these days? Is any alphanumeric transmission 'print'? Is a fax transmission print or

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electronic?" Half-facetiously, Schwartzman proposed defining print media as something "put on paper at a central location and distributed by a truck."

For his part, Robert Corn-Revere does not believe that there should be different First Amendment theories for print and electronic media, now or ever. Despite the historic legal norms applied to broadcasting, he sees no legitimate justification for medium-specific theories of the First Amendment.

In an attempt to envision a "technology transparent" theory, Mark Nadel proposed a rudimentary model that combined parts of other proposals. There would be a presumption that the free market should prevail as the best way to advance First Amendment values, with provisions to prevent media owners from excluding speakers [structural regulation of markets]. If such a scheme proved ineffective for a given medium, a common carrier model should be instituted, with prohibitions against media owners' interfering with content [access regulation]. Finally, if both of the above models do not ensure diverse free speech and access, a public trustee model would be imposed, with affirmative speech requirements for public access, children's or informational programming, etc. [public trustee regulation].

The advantage of this theory, said Nadel, is that it conforms with the "least drastic means" standard of the O'Brien ruling. It favors structural regulation over access regulation, and both of those approaches over content regulation.

Tracy Westen proposed his own "technology transparent" theory: The government has the right to structure the market to balance the respective First Amendment interests of speakers, audiences and media owners. In print, by deferring to the interests of the media owners, government also promotes the interests of speakers and readers. But in other media, such as telephones, government tilts in favor of speakers and imposes the common carrier regulatory structure to ensure universal, fair access. Under Westen's theory, government could require a reasonable right of paid access to newspapers, contrary to Tornillo, because newspapers suffer only a minimal burden on their speech interests while the interests of large numbers of readers (and other speakers) are greatly enhanced.

Andrew Schwartzman observed that a fundamental question in any theory is, "Does the person who controls the conduit have control or influence over the content?" If yes, one set of conclusions holds, and if no, another set holds. This prompted Charles Firestone to return to an issue raised earlier, namely, What are the rights and obligations of communications gatekeepers under the First Amendment? Do gatekeepers have an inherent right to be gatekeepers? Do would-be competitors and viewers have a right to get past the gate?

Angela Campbell of Georgetown University Law Center responded, "That was the issue in NCCB. Everyone has a First Amendment rights, but not everybody has First Amendment rights in broadcasting. That's what justifies the public trusteeship concept. A government license makes you a gatekeeper, and you can't exercise that right without some obligations."

But just as the FCC's new indecency proposal addresses broadcast regulation with respect to cable, said Corn-Revere, why can't government consider the entire media environment when making communications policy? To do so would undercut the rationale for public trusteeship in broadcasting. "Yes," Schwartzman agreed, "but it would also undermine any justification for exclusive licenses in broadcasting."

X. Conclusion

The spirited dialogue of the two-day conference revealed the range of perspectives on the relationship between the First Amendment and the new electronic media. Through their discussion and creation of ten different theories of the applicability of the First Amendment to these media, conference participants identified some of the important societal values at stake, the conceptual quandaries that must be resolved, the legal traditions that may have to be modified, and the complicated political realities of implementing any new vision of the First Amendment for the electronic media.

Without attempting to create a final, comprehensive view of and policy for the First Amendment and the new media, the conference produced some valuable raw timber for future policy builders. In particular, a beginning model of a technology transparent theory was formed from several of the proposed theories, and seemed to be a potentially successful model in terms of the overall goals participants had identified.

To achieve a more coherent, rational policy for the electronic media, particularly with respect to the First Amendment, the Aspen conference was not a panacea, surely, but remains a well-rounded, insightful beginning.

APPENDIX A: A PARTIAL LIST OF REFERENCED CASES

Associated Press v. U.S., 326 U.S. 1 (1945).

FCC v. League of Women Voters of California, 468 U.S. 364 (1984).

FCC v. Pacifica Foundation [Pacifica I], 438 U.S. 726 (1978).

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

National Broadcasting Co. v. U.S., 319 U.S. 190 (1943).

Near v. Minnesota, 283 U.S. 697 (1931).

New York Times v. Sullivan, 376 U.S. 254 (1964).

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

United States v. O'Brien, 391 U.S. 367 (1968).

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APPENDIX C: Program on Communications and Society Policy Statement

The Aspen Institute's Program on Communications and Society seeks to advance communications and information policy-making to the greatest benefit of society. The specific purposes of the Program are (1) to provide a neutral forum for divergent stakeholders to assess the impact of the communications and information revolutions on democratic institutions and values, (2) to help bring about integrated and thoughtful decision-making in the communications and information policy fields, and (3) to benefit society at large by the process. The main efforts at this time are to convene public policy seminars which address specific topics in the field, with the Aspen motto, "thought leading to action" foremost in our minds. The broad issues that the Program seeks to explore in 1990 and 1991 fall into the 4 categories listed below: communications policy, communications for social benefit, communications and education, and communications for global understanding.

1. COMMUNICATIONS POLICY

- **Governance and the democratic process:**
  - Democracy in the Information Age
  - Television Coverage of Campaigns:
    - Models and Options for the US-USSR Commission on Television Policy
- **Telecommunications policy:**
  - Shaping the Future Telecommunications Infrastructure
  - Communications Counsel's Forum (in formation)
  - Aspen Communications Roundtable (in formation)
- **Freedom of Expression:**
  - Electronic Media Regulation and the First Amendment

2. COMMUNICATIONS FOR SOCIAL BENEFIT

- **The social impact of computer networks:** Online for Social Benefit
- **Multimedia technologies:** Multimedia Designers
- **Interactive computer services for the elderly:** SeniorNet Services
- **Television in the 21st Century** (proposed)

3. COMMUNICATIONS AND EDUCATION

- **Understanding and using the electronic media:**
  - Media Literacy: Definitions, Visions and Strategies for the 1990s (proposed)
- **The role of telecommunications technology in primary and secondary education:**
  - The Aspen Forum on Education and Telecommunications (proposed)

4. COMMUNICATIONS FOR GLOBAL UNDERSTANDING

- **Democratic process and the Soviet media:**
  - Television Coverage of Campaigns:
    - Models and Options for the US-USSR Commission on Television Policy
- **The impact of the collapse of communism on Eastern and Central European publishing:**
  - Books Across Borders: East Meets West --
    - 1991 Jerusalem International Book Fair Aspen Forum

The Aspen Cube: A Three Dimensional Roadmap for Communications Policy Issues

The field covered by The Aspen Institute's Program on Communications and Society is vast, but the many issues it covers can be defined and interconnected by means of a three-dimensional matrix, a kind of Rubik's Cube of the Information Age. Along one axis are the characteristics of the technological trends in communications, which will vary:

Interactivity; user control; targeting

Compression of space, time, and matter

Interconnectivity;portability; ubiquity

Broadband delivery of information

Ease of copying

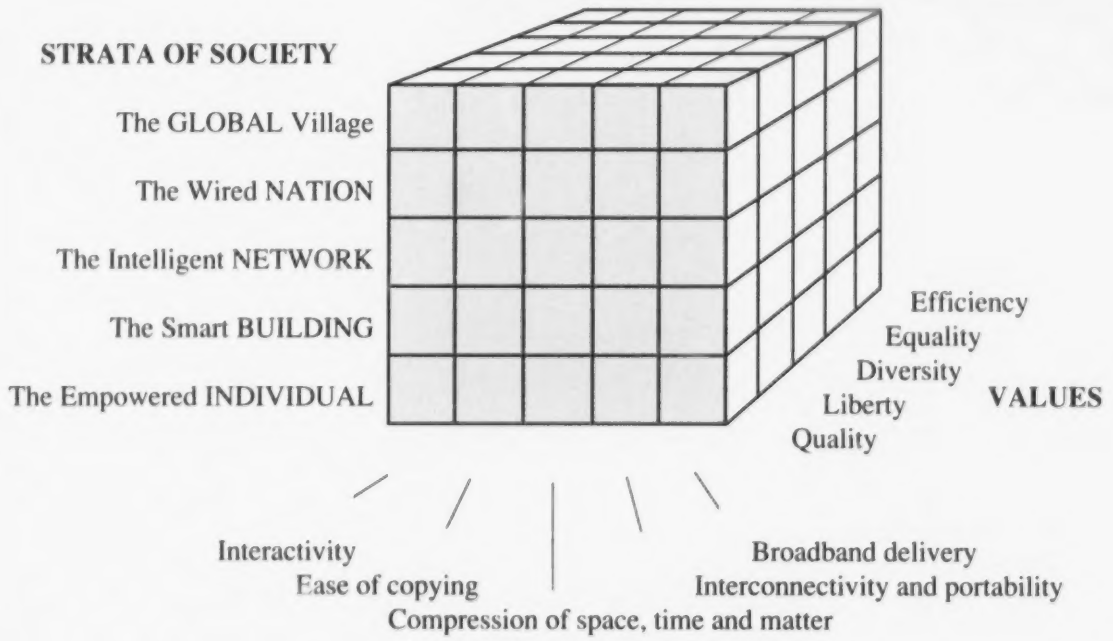
Across another side of the matrix are the strata of society from which one should view the issues, viz., international; national; community; home, school, or office; and the individual. We use labels that have entered the vocabulary from the Communications Revolution:

The Global Village
The Wired Nation
The Intelligent Network
The Smart Building
The Empowered Individual

The third side of the cube lists the values that are most associated with the new communications media, structures and institutions. This list, too, can vary. Our present approach looks at:

Diversity(including Cultural Identity)
Efficiency (including Market Forces)
Equality (including Universality and Equity)
Liberty (including Privacy and Free Speech)
Quality (including Quality of Life)

This construct can be pictured as a cubic matrix. From any particular point or cube within the matrix, one can move along any or all of the three axes, connecting technological trends, strata of society, and values.



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